

California Regional Water Quality Control Board
North Coast Region

CLEANUP AND ABATEMENT ORDER NO. R1-2006-0058

FOR

JOHN E. DIEHL
and
SQUARE DEAL BUILDERS SUPPLY
and
L.C. BLISS and SONS LIVESTOCK CORPORATION
and
L. C. BLISS AND SONS LIVESTOCK CORPORATION EMPLOYEE STOCK OWNERSHIP
TRUST

475 K Street
Crescent City, California

Del Norte County

The Regional Water Quality Control Board, North Coast Region, (hereinafter Regional Water Board) finds that:

1. In January of 1980, L.C. Bliss and Sons Livestock Corporation purchased the Square Deal Builders Supply business and the property located at 475 K Street in Crescent City (hereinafter Site) from Bruno and Vittoria Brunello. Square Deal Builders Supply was wholesale and later retail sales of building supplies. Prior to 1976, three underground storage tanks (USTs) were installed at the Site, and in 1989, two were removed. No additional information on the installation or removal of the USTs is available.
2. In July of 1994, an environmental investigation was conducted. Contamination was encountered in the former location of the USTs and a third UST was identified.
3. In September of 1994 L.C. Bliss and Sons Livestock Corporation Employee Stock Ownership Trust purchased the entire stock, business, and property from L. C. Bliss and Sons Livestock Corporation.
4. In June of 1995, the remaining UST was removed by L.C. Bliss and Sons Livestock Corporation and additional environmental samples were collected. The USTs contained gasoline, diesel, and motor oil. Groundwater samples indicate contamination of up to 3,000 parts per billion (ppb) of Total Petroleum Hydrocarbons (TPH) as gasoline, 5,600 ppb of TPH as diesel, 11,000 ppb of TPH as motor oil, and 63 ppb of benzene.
5. On May 11, 1996, a Straight Note was executed between Jeffrey Frank, Trustee for L.C. Bliss and Sons Livestock Company Employee Stock Ownership Plan and John E. Diehl for the sum of \$560,000 at 15 % interest to be fully repaid by November of 1996.

On May 15, 1996, L.C. Bliss & Sons Livestock Company (borrower) signed a Deed of Trust conveying John E. Diehl (lender) conditional title to the Site.

6. In October of 1996, approximately 1,250 cubic yards of contaminated soils were removed by L. C. Bliss and Sons Livestock Corporation from the area of the former USTs. These soil samples indicate contamination up to 1,100 parts per million (ppm) of TPH as gasoline, 140 ppm of TPH as diesel, and 120 ppm of TPH as motor oil. The contaminated soil was stockpiled under an awning on the asphalt. The soils currently remain in the same location.
7. On or about March 17, 1997, L.C. Bliss and Sons Livestock Corporation initiated bankruptcy proceedings and ceased the operation of Square Deal Builders Supply.
8. On January 16, 1998, title to the Site was transferred to Mr. John E. Diehl as the foreclosing beneficiary for the sum of \$585,000.00. The Deed was recorded on September 18, 1998.
9. John E. Diehl, Square Deal Builders Supply, L.C. Bliss and Sons Livestock Corporation, and L. C. Bliss Livestock Corporation Employee Stock Ownership Trust, are hereinafter referred to as Dischargers at the Site.
10. John E. Diehl is named as a discharger because he is the current owner of the Site. L.C. Bliss and Sons Livestock Corporation is named as a discharger as an owner and operator of the former underground tanks when a discharge was discovered. L.C. Bliss and Sons Livestock Corporation Employee Stock Ownership Trust is named as a discharger as an owner of the property after a discharge was discovered.
11. On August 25, 1999, Mr. John E. Diehl informed the Regional Water Board that the Site was obtained in a foreclosure and that the collateral properties have been for sale since he acquired them. The Site was listed in 1999 with Ming Tree Real Estate according to Mr. Diehl. Mr. Diehl has maintained since 1999 that he is exempt from being a responsible party pursuant to the lender liability provisions set forth in Health and Safety Code section 25548 et seq.
12. In a letter dated July 28, 2005, the Regional Water Board requested that Mr. Diehl submit any documents supporting his contention that he was protected by the lender liability provisions of the Health and Safety Code. The Regional Water Board requested additional information from Mr. Diehl in correspondence dated September 16, 2005. The documents submitted by Mr. Diehl in response to these requests do not support his contention that he is exempt from liability, for the following reasons:
 - a) Mr. Diehl is not a "lender," as that term is defined in Health and Safety Code Section 25548.1, subdivision (i).

Health and Safety Code Section 25548.1(i) defines a “lender” as:

“a person to the extent of the capacity in which that person maintains indicia of ownership primarily to protect a security interest or makes, acquires, renews, modifies, or holds a loan or obligation from a borrower....”

Mr. Diehl calculates the value of his security interest at the time he listed the properties for sale in January of 1999 as \$854,239.26. This amount includes the principal due on the loan of \$560,000, plus compounded interest at a rate of 15 percent per year, plus costs incurred related to the properties, (taxes, repairs, foreclosure, services, etc.) minus any income received from the properties.

Mr. Diehl’s calculation of the value of his security interest as of January 1, 1999 is in error. Because Mr. Diehl took title to the properties in a non-judicial foreclosure, he is barred from seeking a deficiency judgment (i.e., a money judgment for the difference, if any, between the note amount and the foreclosure sale price). (Code Civ. Proc., § 580d.) In addition, because Mr. Diehl bid the full amount of debt owned at the foreclosure sale, the debt is effectively satisfied as if paid in full and the lender is barred from seeking further monetary remedies.

On November 11, 1996, the date the loan was due and payable, the balance of the debt owed to Mr. Diehl was \$581,263.59. This is consistent with Mr. Diehl’s own calculation. This debt amount remains static and does not continue to accrue compounded interest. The value of Mr. Diehl’s security interest is \$581,263.59.

Documents submitted by Mr. Diehl indicate that he listed the Site for sale in January of 1999 for a total of \$1,195,000. This is nearly double the value of Mr. Diehl’s security interest and suggests that Mr. Diehl’s ownership of the properties was not intended primarily as a means of securing payment. Instead, it suggests Mr. Diehl held ownership of the properties primarily for profit.

Because Mr. Diehl did not hold ownership of the properties primarily to protect a security interest, he does not fit within the definition of a “lender” under Health and Safety Code section 25548.1, subdivision (i) and therefore, is not protected by the lender liability provisions of the Health and Safety Code.

- b) Mr. Diehl did not undertake to divest himself of the property in a “reasonably expeditious manner.”

Health and Safety Code section 25548.5, subdivision (a) provides, in part, that the lender liability protection does not apply,

“If, after foreclosure or its equivalent is conducted, the lender does not take to sell...or otherwise undertake to be divested of the property in a reasonably expeditious manner, using whatever commercially reasonable means are relevant or appropriate with respect to the property, taking all facts and circumstances into consideration.”

The findings in Paragraph 12(a) are incorporated herein.

The fact that, in January 1999, Mr. Diehl listed the properties for sale in an amount nearly double the value of his security interest is an indication that he did not take to be divested of the property in a reasonably expeditious manner.

Because Mr. Diehl did not take to be divested of the property in a reasonably expeditious manner, he is not protected by the lender liability provisions of the Health and Safety Code.

c) Mr. Diehl’s loan was made primarily for investment purposes.

Health and Safety Code Section 25548.5, subdivision (k) provides that the lender liability protection does not apply if,

“the lender made, secured, held, or acquired the loan or obligation primarily for investment purposes.”

The findings in Paragraph 12(a) are incorporated herein.

Mr. Diehl listed the properties for sale for significantly more than the value of his security interest, suggesting Mr. Diehl’s intent in making the loan was to turn a profit. Therefore, it is appropriate to characterize the loan as one made as an investment.

Because Mr. Diehl acquired the loan primarily for investment purposes, he is not protected by the lender liability provisions of the Health and Safety Code.

13. The site is located in Crescent City less than one mile from Crescent City Harbor and overlies shallow groundwater that is less than five feet below the ground surface
14. The beneficial uses of shallow areal groundwater include:
 - a) domestic supply
 - b) agricultural supply
 - c) industrial supply
15. The existing and potential beneficial uses of Crescent City Harbor include:

- a) freshwater replenishment
 - b) navigation
 - c) water contact recreation
 - d) non-contact water recreation
 - e) commercial and sport fishing
 - f) warm freshwater habitat
 - g) cold freshwater habitat
 - h) wildlife habitat
 - i) rare, threatened, or endangered species
 - j) marine habitat, migration of aquatic organisms
 - k) shellfish harvesting
 - l) aquaculture
16. The Dischargers named in this Order have caused or permitted, cause or permit, or threaten to cause or permit waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and create, or threaten to create, a condition of pollution or nuisance. The discharge and threatened discharge of contaminants has unreasonably affected water quality in that the discharge or threatened discharge is deleterious to the above described beneficial uses of State waters, and has impaired water quality to a degree which creates a threat to public health and public resources and therefore, constitutes a condition of pollution or nuisance. These conditions threaten to continue unless the discharge or threatened discharge is permanently cleaned up and abated.
17. The Water Code, and regulations and policies developed there under require cleanup and abatement of discharges and threatened discharges of waste to the extent feasible. Cleanup and abatement activities are to provide attainment of background levels of water quality or the highest water quality that is reasonable if background levels of water quality cannot be restored. Alternative cleanup levels greater than background concentration shall be permitted only if the discharger demonstrates that: it is not feasible to attain background levels; the alternative cleanup levels are consistent with the maximum benefit to the people of the State; alternative cleanup levels will not unreasonably affect present and anticipated beneficial uses of such water; and they will not result in water quality less than prescribed in the Basin Plan and Policies adopted by the State and Regional Water Board.
18. Water quality objectives in the Basin Plan are adopted to ensure protection of the beneficial uses of water. The most stringent water quality objectives for protection of all beneficial uses are selected as the protective water quality criteria. Alternative cleanup and abatement actions must evaluate the feasibility of, at a minimum: (1) cleanup to background levels, (2) cleanup to levels attainable through application of best practicable technology, and (3) cleanup to protective water quality criteria levels. Attachment A, attached to and made part of this Order, sets out the water quality objectives for waters of the State impacted by discharges from the Site.

19. Discharge prohibitions contained in the Basin Plan apply to this site. State Water Resources Control Board Resolution 68-16 applies to this site. State Water Resources Control Board Resolution 92-49 applies to this site and sets out the "Policies and Procedures for Investigation and Cleanup and Abatement of Discharges under Section 13304 of the California Water Code."
20. The Regional Water Board will ensure adequate public participation at key steps in the remedial action process, and shall ensure that concurrence with a remedy for cleanup and abatement of the discharges at the site shall comply with the California Environmental Quality Act (Pub. Resources Code, §§ 21000-21177; ("CEQA").
21. The issuance of this Cleanup and Abatement Order is an enforcement action being taken for the protection of the environment and, therefore, is exempt from the provisions of CEQA in accordance with sections 15308 and 15351, title 14 of the California Code of Regulations.
22. Any person affected by this action of the Regional Water Board may petition the State Water Resources Control Board (State Water Board) to review the action in accordance with section 13320 of the California Water Code and title 23, California Code of Regulations, section 2050. The State Water Board must receive the petition within 30 days of the date of this Order. Copies of the law and regulations applicable to filing petitions will be provided upon request. In addition to filing a petition with the State Water Board, any person affected by this Order may request the Regional Water Board to reconsider this Order. To be timely, such request must be made within 30 days of the date of this Order. Note that even if reconsideration by the Regional Water Board is sought, filing a petition with the State Water Board within the 30-day period is necessary to preserve the petitioner's legal rights.
23. This Order in no way limits the authority of this Regional Water Board to institute additional enforcement actions or to require additional investigation and cleanup at the facility consistent with Water Code. This Order may be revised by the Executive Officer as additional information becomes available.

THEREFORE, IT IS HEREBY ORDERED that, pursuant to California Water Code sections 13267(b) and 13304, the Dischargers shall cleanup and abate the discharge and threatened discharge of waste described above and shall comply with the provisions of this Order:

1. The Dischargers shall conduct investigation and cleanup tasks under the direction of a California registered geologist or registered civil engineer experienced in soil and groundwater assessment and remediation.

2. The Dischargers shall take no action that causes or permits or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be discharged into waters of the state.
3. The Dischargers shall comply with any Monitoring and Reporting Program issued in connection with the investigation and cleanup of contamination at the Site.
4. The Dischargers shall submit a workplan to characterize the soil stockpiled on Site by June 15, 2006.
5. The Discharges shall have the soil stockpiled on Site disposed at the appropriately permitted facility by September 1, 2006.
6. The Dischargers shall submit a workplan to define the vertical and lateral extent of soil and groundwater contamination by July 1, 2006.
7. The Dischargers shall implement the workplan submitted under Provision 4 above within 60 days of concurrence by the Executive Officer. The Dischargers shall submit an investigation report presenting the information gathered pursuant to Provision 4 above to the Executive Officer within 120 days of concurrence with the workplan.
8. The Dischargers shall conduct a feasibility study to evaluate alternatives for restoring the beneficial uses of groundwater beneath the Site. The Dischargers shall submit to the Executive Officer a Corrective Action Plan (CAP) by June 1, 2007. The CAP shall include at a minimum the results of the feasibility study and identifies and evaluates at least two alternatives for restoring or protecting the beneficial uses of groundwater at the Site. The CAP shall also include a proposal to implement the most cost-effective corrective action and a time schedule for CAP implementation.
9. The Dischargers shall implement the CAP submitted under Provision 8 above within 60 days of receiving written concurrence from the Executive Officer.
10. If, for any reason, the Dischargers are unable to perform any activity or are unable to submit any documentation in compliance with the schedule set forth herein or in compliance with any work schedule submitted pursuant to this Order and concurred in by the Executive Officer, the Dischargers may request, in writing, an extension of time. The extension request must be submitted at least twenty (20) days in advance of the due date and shall include justification for any delay including a description of the good faith effort performed to achieve compliance with the due date. The extension request shall also include a proposed time schedule with new performance dates for the due date in question and dependent dates. An extension may be granted for good cause, as determined by the Executive Officer in his or her sole discretion, and this Order will be accordingly revised.

11. This Order in no way limits the authority of this Regional Water Board to institute additional enforcement actions or to require additional investigation and cleanup at the facility consistent with Water Code. This Order may be revised by the Executive Officer as additional information becomes available.
12. Failure to comply with the terms of this Order may result in enforcement under the Water Code. Any person failing to provide technical reports containing information required by this Order by the required date(s) or falsifying any information in the technical reports is, pursuant to Water Code section 13268, guilty of a misdemeanor and may be subject to administrative civil liabilities of up to one thousand dollars (\$1,000.00) for each day in which the violation occurs. Any person failing to cleanup or abate threatened or actual discharges as required by this Order is, pursuant to Water Code section 13350(e), subject to administrative civil liabilities of up to five thousand dollars (\$5,000.00) per day or ten dollars (\$10) per gallon of waste discharged.

Ordered by _____
Catherine E. Kuhlman
Executive Officer

May 10, 2006